Supreme Court, U. S.
FILED
APR 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-164

PASADENA CITY BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

NANCY ANNE SPANGLER, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

LEE G. PAUL,
PETER D. COLLISSON,
ROBERT G. LANE,
PAUL, HASTINGS, JANOFSKY & WALKER,
55 South Flower Street,
Los Angeles, California 90017,
Attorneys for Petitioners.

PHIL C. NEAL,
FRIEDMAN & KOVEN,
208 South LaSalle Street,
Chicago, Illinois 60604,
(312) 346-8500,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

PAGE

I. The Court of Appeals Did Not Grant the Required Relief from the Racial-Balance Requirement 2

II. Under the Standards Acknowledged by the Government, Petitioner Is Entitled to Release from Regulatory Jurisdiction 4

III. The District Court's Rejection of the Alternative Plan Was an Abuse of Discretion 12

TABLE OF CASES.

Brown v. Board of Education, 349 U. S. 294 (1955)..13, 18, 19

Green v. County School Board, 319 U. S. 430 (1968) ..13, 14

Keyes v. School District No. 1, 413 U. S. 189 (1973 ...10, 19

Milliken v. Bradley, 418 U. S. 717 (1974) 18

Monroe v. Board of Commissioners, 391 U. S. 450 (1968) 13, 14

Pasadena City Board of Education v. Spangler, ... U. S. ....., 96 S. Ct. 416, 46 L. Ed. 2d 364 (1975) 4, 15, 17

Spangler v. Pasadena City Board of Education, 375 F. Supp. 1304 (C. D. Cal. 1974) .....*passim*

Spangler v. Pasadena City Board of Education, 384 F. Supp. 846 (C. D. Cal. 1974) 9

Spangler v. Pasadena City Board of Education, 519 F. 2d 430 (9th Cir. 1975) 3, 8, 13

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-164.

PASADENA CITY BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

NANCY ANNE SPANGLER, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

In this Reply Brief we address ourselves primarily to three contentions urged by respondent United States in its main brief:[1] (1) That the need for relief has been obviated by *dicta* in the opinions of the court below; (2) that petitioner has failed to satisfy the appropriate standard for release from the active judicial supervision of the district court; and (3) that the district court's rejection of petitioner's proposed modification of the Pasadena Plan was a proper exercise of its discretion.

---

1. To the extent that points urged by the individual respondents (herein, Spangler Br.) require additional reply, they are dealt with at the appropriate points in this reply brief.

We submit that far from demonstrating the absence of a need for corrective action by this Court, the concessions made and principles acknowledged in the Government's brief make it plain that reversal is required. We further submit that if the active supervision of the district court is not terminated, the case clearly calls for guidance from this Court as to the principles to be observed by the district court in any further proceedings.

I.

THE COURT OF APPEALS DID NOT GRANT THE REQUIRED RELIEF FROM THE RACIAL-BALANCE REQUIREMENT.

Petitioner's motion to the district court requested termination of the requirement that there be no school in the District with a majority of any minority students. App. 232-33. The district court denied that relief and declined to modify its injunction. App. 459. Moreover, the district court made clear in the course of the proceedings that it viewed the injunction (1) as having permanent effect and (2) as requiring annual reassignment of pupils to the extent necessary to maintain compliance. App. 270. The court of appeals affirmed the judgment of the district court without modification. 519 F. 2d 430, 440, Pet. f Cert. A14.

The United States now concedes that the requirement of continuing racial balance in all schools is insupportable. Govt. Br. 28, 37-38. It suggests, however, that petitioner's request for relief is superfluous because of statements in the opinions of the court of appeals that "disapproved" the racial-balancing requirement. Govt. Br. 28, 37. That suggestion is incorrect. The statements made by the court of appeals have not eliminated the issue.

(a) Whatever the significance of the views announced in *dicta* in the several opinions of the court of appeals, petitioner has received no relief from the no-majority-of-a-minority requirement. For reasons set forth in our main brief, and apparently not disputed by the Government, the Pasadena School Board should no longer be subject to that requirement, whether or not the requirement was originally valid. The requirement has now been in force for six school years (including the present one). The racial balance of the pupil population in the Pasadena school district makes the requirement virtually a fixed quota for every school. Even without the need for continuous annual reassignment of pupils (an obligation that has not been negated by any action of the court below) the existence of the requirement seriously impedes other measures designed by the school board to achieve a stable integrated school system and improve educational opportunities for all children. See *infra* at pp. 15-17.

(b) The *dicta* in the opinions below do not clearly resolve the status of the racial-balancing requirement. Judge Ely's opinion merely suggested that at some point "continuous annual redistricting" to correct "*de minimis* alterations in racial balance in specific schools" would no longer be appropriate. 519 F. 2d at 437-38, Pet. for Cert. A11. Judge Chambers "interpreted" that suggestion to require termination of "the mandatory injunction" within a "very short time" and suggested he could "go along" only with one more required reassignment. 519 F. 2d at 440, Pet. for Cert. A21-22. Judge Wallace, dissenting, did not directly address this issue because he would have remanded for a proper determination of the question whether jurisdiction should be terminated altogether. But he correctly noted that Judge Ely's opinion does not support the interpretation Judge Chambers gave it, stating: "Judge Ely apparently would enforce the 'no majority of any minority' provision of the injunction indefinitely but would allow de minimis deviations after de jure segregation has been eliminated. Judge Chambers apparently would abandon the injunction entirely once de jure segregation has been abolished." 519 F. 2d at 445, n. 8. (Judge Wallace also correctly noted that the *Swann* decision "requires that racial quotas be flexibly interpreted even before de jure segregation has been eliminated." *Id.* at 445.)

(c) On October 8, 1975, more than five months after the decision of the court of appeals, the district court entered a further order, enjoining the creation of an additional "fundamental" school in the Pasadena school district. That order is the subject of a stay granted by Mr. Justice Rehnquist on December 22, 1975. *Pasadena City Board of Education* v. *Spangler*, No. A-538, ... U. S. ....., 96 S. Ct. 416. The record of that proceeding shows that the district court regarded the racial-balancing injunction as being in full force as of that date and gives no suggestion of prospective elimination of the requirement. (Aud. Tr., Sept. 15, 1975, e.g., 53-54, 117, 134.)[2]

There is thus a clear need for action by this Court to relieve petitioners of the continuing operation of the requirement of strict racial balance in every school.

II.

UNDER THE STANDARDS ACKNOWLEDGED BY THE GOVERNMENT, PETITIONER IS ENTITLED TO RELEASE FROM REGULATORY JURISDICTION.

The Government recognizes that in school desegregation cases it is appropriate to terminate active judicial supervision when a school district has achieved "unitary" status. Nevertheless it suggests that the Pasadena school district has not yet qualified for such release under the "evolving standards" for termination. We submit that the very examples cited by the Government show that the Pasadena system does qualify. The standard proposed by the Government in the "illustrative memoranda" referred to in the Government's brief (p. 57) is as follows:

> "We would suggest . . . that a school district which has achieved and maintained unitariness over a period of three school years and has not been found to have engaged in racial discrimination during that period will have remedied (to the extent they are remediable) the effects of past discrimination."[3]

2. The record of that proceeding (known as the Audubon School hearing), which has been quoted in the Government's brief (Govt. Br. 13), has been lodged with the Clerk. References to it hereinafter are cited "Aud. Tr."

The same standard has been followed in each of the Fifth Circuit cases referred to at pp. 56-57 of the Government's brief and in the illustrative orders set forth in the Appendix to that brief.

The Pasadena school board had been in substantial compliance with the district court's desegregation decree for a period of four school years at the time the district court denied petitioner's request for relief. At the present date it has been in such compliance for a period of six school years. It has not been found to have engaged in racial discrimination at any time during that period. It has not been found to have engaged in any of the actions against which the original decree was directed.

Thus there is fully as much warrant as appears in the examples cited by the Government for concluding that the Pasadena school district has "remedied to the extent that they are remediable" the effects of past discrimination. None of the reasons advanced by respondents for repudiating that standard in this case are substantial or persuasive.

1. The Government directs superfluous argument against what it calls the "instant unitariness" theory. This is mere word play. Petitioner has not contended, and obviously need not contend, that it was entitled to be relieved of judicial supervision the moment the desegregation plan was put into effect.

The point is that the reorganization of the school system pursuant to the decree did, as of that time, render the system a "unitary" system in precisely the same sense as that term is used in the orders relieving school districts in the Fifth Circuit from active supervision. Compliance with the decree commenced the running of the period for determining release. Each of the orders set forth in the Appendix to the Government brief recites that

3. *E.g.*, Response of the United States, *United States* v. *County School Board of Sussex County* (E. D. Va. No. 6060-R), p. 3.

the schools "have been operating a *unitary system* for the past three years" (emphasis supplied). The orders clearly import that the three-year period dates from the time the desegregation plan was put into effect. (See, e.g. *Ridley* v. *Georgia*, Govt. Br. 164, where the order recites that specified districts "have for three years assigned students to the public schools in accordance with the plans approved by the Northern District and have become 'unitary' in the sense required by the Supreme Court's decisions in *Green* v. *County School Board*, 391 U. S. 430 (1968) and *Swann* v. *Board of Education*, 402 U. S. 1 (1971).")[4]

In sum, the "evolving standard" has been that when a school district has been operated for three years or more in accordance with an order achieving desegregation it is appropriately relieved of active judicial supervision, whether the term "unitary" denotes its condition at the beginning or at the end of that process. The Pasadena district has more than satisfied those conditions.

2. The respondents appear to suggest, alternatively, that the school district will not have met its burden until it can demonstrate that every vestige or effect of past discrimination has been eradicated. No such burden has been suggested, or declared to have been met, in the examples cited in which supervision has been terminated. Speculation about "lingering effects" of past discrimination is possible in every case. If speculation rather than facts were the test, it would be far more difficult to suppose that lingering effects of a hundred years of state-compelled dual school systems in the South have been wholly dispelled by three years of integrated schools than that the effects of past practices like the ones found in this case have been neutralized. To demonstrate the absence of such effects is a burden that could never be met.

4. See also Response of the United States, *U. S.* v. *County School Board of Sussex County*, *supra* n. 3, suggesting that jurisdiction should be dismissed altogether after a total period of ten years, *"three under the regulatory injunction* and seven under the permanent injunction". Response, p. 5, n. 4 (emphasis supplied).

Neither the district court nor the respondents here have pointed to a single specific example of how any of the "actions and inactions" on which the district court's 1970 order was based (Findings of Fact, App. 100-133) can have any present tendency to perpetuate segregation. The complete reshuffling of attendance zones under the Pasadena Plan has necessarily obliterated any effects of past pupil assignments, as well as of past transfer policies. The few instances of discriminatory siting and school-capacity decisions found by the district court (App. 119-123) have likewise been rendered irrelevant by the radical alteration of attendance zones, as well as by demographic changes and changes in the use of school buildings. There is no evidence that the school board has discriminated in the appointment and assignment of its teaching and administrative staffs.[5] As to residential segregation, although the district court in its original findings recited that the school board was "aware of the existence of residential segregation and the discrimination that underlies it" (Finding 26, App. 111), there was understandably no finding that the board had caused residential segregation, or even contributed to it. The continued existence of racial residential patterns can hardly be ground for continued jurisdiction over the Pasadena school system.

There is, in short, a complete lack of any basis for imposing on the Pasadena board a burden of demonstrating the absence of "vestiges" of past practices having segregatory effects, even if the burden of proving such a negative would ever be an appropriate test for relinquishing judicial supervision.

3. The suggestion of the United States that petitioner's compliance with the desegregation order "has been grudging at best" (Govt. Br. 57) is without support in the record. It is also incon-

5. The individual respondents in their brief in this Court misleadingly use the present tense in reciting facts about assignment of teachers and staff. (Spangler Br. 8-10.) Each of the cited references to the record at those pages of their brief are to the findings of fact which accompanied the district court's 1970 order, not to evidence in the proceeding that is here under review.

sistent with the proposition simultaneously asserted by the Government that the order "has succeeded as an instrument of desegregation" (Govt. Br. 16) and "has not been unsuccessful educationally" (*id.* 61). What the record actually shows is that the school board has diligently carried out the desegregation order while at the same time undertaking innovative measures, with considerable success, to achieve educational progress, promote voluntary integration, and stabilize the racial composition of the district. The board's failure to convince the district court that the court-ordered plan was in fact detrimental to the full realization of those objectives is no evidence of lack of compliance or of "grudging compliance."

The district court cited no instance of lack of compliance by the school board with its order, with one exception. That exception was the fact that during the four years of the Plan's operation demographic changes had caused five schools to exceed 50% black enrollment by small percentages. (375 F. Supp. 1304, 1306, App. 454; for the percentages, see dissenting opinion of Judge Wallace below, 519 F. 2d at 443, Cert. Pet. A26.) It is conceded that these "violations" were unintentional and were due to the fact that none of the parties had understood the decree as requiring annual redistricting to eliminate minor variations from the no-majority-of-a-minority requirement. Stipulation, App. 268; Govt. Br. p. 16, n. 22. After the trial judge announced his interpretation of the decree during the course of the present proceedings (App. 270), the school board has redistricted annually in compliance with that interpretation. (See Aud. Tr. 116, 224-25.) These circumstances afford no basis for finding resistance to the court's decree or "grudging" compliance with it.[6]

6. Nor can any such basis properly be found in the board's action in making five temporary appointments without following the detailed personnel procedures prescribed by the Pasadena Plan for permanent appointments. (See Govt. Br. pp. 18, 57; Spangler Br. 19-20.) The district court itself made no reference to

(Continued on next page.

4. In defending the district court's action, the Government's brief fails to address what was plainly the primary basis for that action, namely, that the school board (and the voters who elected them) had expressed strong opposition to the Pasadena Plan. That is the sole basis appearing in the record for the district court's statement that "the Pasadena Plan has not had . . . cooperation from the Board." 375 F. Supp. 1304, 1308; App. 458.[7] So far as cooperation by the Board is concerned, nothing in the record qualifies or refutes the position clearly stated when the first version of a revised plan was proposed to the board by board member Marcheschi on October 26, 1971:

> Let me make it unquestionably clear that under no circumstances do I favor "defiance" of the present Court mandate. Whether we agree or disagree with the Pasadena Plan and the decision of Judge Real, respect of law and

the matter in its opinion denying relief. Indeed, when the matter had come up during the course of the trial on the petition for relief, the court stated that although he was of the opinion that the personnel procedures covered "all administrators" (contrary to the board's understanding that acting or temporary appointments were not covered) he would not find on the evidence before him that the board had acted in bad faith. (Tr. 700.)

The ensuing contempt proceedings adverted to by the Government (Govt. Br. 18, n. 23) show the difficulty of compliance with the district court's evolving interpretations. As soon as the district court's interpretation of the personnel procedures was announced during the course of the hearing on the petition for modification, the school board promptly proceeded to advertise for, recruit, and select permanent candidates for the five disputed positions in accordance with the personnel procedures of the Plan. See 384 F. Supp. 846, 851. The disputed issue in the contempt proceedings was simply whether the board was required not merely to make reappointments but, pending those reappointments, to *vacate* the existing temporary appointments. The latter requirement, however, was not made clear until the very decision in which the contempt order was issued, as sufficiently appears from the opinion itself.

7. The district court subsequently made its position crystal clear. It stated that "a majority of the Board's expressed opposition to the Pasadena Plan" precluded finding "any element of good faith" in connection with the personnel dispute, citing the court's previous opinion in the relief proceedings. 384 F. Supp. 846, 850.

social order is paramount to all other considerations for such is the heart and soul of our American System.

How, then, do we implement modifications of the present plan? How do we overcome the present mandate that "no school shall have a majority of a minority race"? I readily admit this restriction is not compatible to certain aspects of the New Pasadena Plan which I will set forth in Part II of this presentation.

The first step is to a majority of the Pasadena School Board to agree on such modifications and present them to the District Court for approval. In view of the radical changes in circumstances which have occurred since the decision, and especially in view of the Supreme Court decision in the *Swann* case, I have every reason to hope the District Court would look favorably on a new plan. [App. 432-33.]

As we have pointed out in our main brief (p. 19), the views expressed and the objectives sought by the school board were wholly consistent with policies advocated in the concurring opinion in *Keyes* v. *School District No. 1*, 413 U. S. 189, 244 *et seq.*, and reflected in statutes of the United States. The Board has never sought to achieve its objectives except by proper legal means, namely, the bringing of the very petition that is the subject of this review.

It would be ironic, indeed, if the expression of such views, and the pursuit of legal remedies, were allowed to be the basis for finding "lack of cooperation" and denying the relief to which the Board is otherwise entitled.

5. Nor can it be a proper objection to termination of regulatory jurisdiction that plans contemplated by a school board may result in racial imbalance in individual schools, or in racial composition of schools different from that resulting from the court-ordered plan of pupil assignment. The Government concedes as much. (Govt. Br. 47, n. 38, 58: "The extent of racial balance resulting from a judicial decree may often change after a decree is lifted.") Thus, even if the district court's speculation were correct that the Board's proposed new plan might result

in a number of schools with over 60% black enrollment (App. 455-500)—a conjecture that is unsupported by evidence—that possibility cannot of itself be a valid reason for refusing to lift the regulatory decree.

The Government appears to suggest, however, that the announced intention of a school board to modify an existing plan if the regulatory injunction were lifted is itself a reason for refusing that relief. (Govt. Br. 48, 50, 58 2A.) That, too, would be perverse and self-contradictory. It cannot be an objection to termination of jurisdiction that the school district will or may alter the plan previously ordered by the court. If that were so there would be no purpose in terminating regulatory supervision. The orders set forth by the Government in its Appendix contain no suggestion that they are conditioned on the continuance of the very plans previously enforced by judicial decree; if they were, no purpose would be served by substituting their general prohibitory injunctions for the previous detailed regulatory injunctions. The very purpose of relief from regulatory orders is to permit local authorities to resume full control over the education of the school children for whom they are responsible, subject to compliance with constitutional requirements.

For the foregoing reasons, we believe it clear that the petitioners were entitled to an order terminating the active supervision of the district court. Even if that is not true, however, it is abundantly clear that the district court failed to consider the issue under proper legal standards. In effect, the district court did not consider the question at all. The only reasons given for denying relief from the injunction were the reasons relied on by the court for rejecting the proposed alternative plan. The court stated merely that modification of the injunction would "leave the Board to its own devices" and would be "to sign the death warrant" of the court-ordered plan. (App. 459.) At a minimum, therefore, reversal is required, with directions to the district court to apply correct legal standards to petitioner's request for relief from active supervision.

III.

THE DISTRICT COURT'S REJECTION OF THE ALTERNATIVE PLAN WAS AN ABUSE OF DISCRETION.

The Government seeks to uphold the district court's action rejecting petitioner's Alternative Plan by reference to "the wide range of discretion in the District Court to mould [a] decree to the exigencies of the particular case." (Govt. Br. 58-59.) The question, however, is not whether the district court has wide discretion but whether it exercised its discretion according to proper legal standards and whether it did, in fact, "mould its decree according to the exigencies" of the problem with which it was confronted.

We submit that the reasons advanced by the courts below and by respondents cannot support rejection of the school board's proposals, and that the district court's approach represents a serious departure from that sensitive "reconciliation of competing values in a desegregation case" which this Court has assumed a court of equity will undertake. *Swann* v. *Board of Education*, 402 U. S. 1, 31.

1. Significantly, the Government does not attempt to justify the district court's primary rationale for rejection, namely, that the Alternative Plan would not "*guarantee* that no school in a once-segregated school district shall be permitted to have an enrollment with a majority of any minority." 375 F. Supp. 1304, 1307; App. 456 (emphasis supplied.) That objection to the Plan was ruled out by *Swann*: "[I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U. S. 1, 26. The district court's mistaken premise on this point was so fundamental to its judgment as to constitute in itself sufficient ground for reversal.

2. To support the action of the district court the Government relies mainly (as did Judge Ely in the court below) on previous decisions of this Court disapproving "freedom-of-choice" plans where such plans were proposed as the initial and exclusive means for converting dual school systems into unitary systems. (Govt. Br. 59-60.)[8] That reliance is improper. The *Green* and *Monroe* decisions[9] are not controlling.

There is a vast difference between the use of freedom of choice as the only remedy for undoing the effects of a completely dual school system, at the outset of desegregation, and introducing elements of freedom of choice into a school system that has operated for four (now six) years under a rigid racial-balancing, compulsory-busing decree. If compulsory integration of schools can have an effect upon the attitudes and expectations of children, parents, and school authorities—if the whole history of enforcement since *Brown* v. *Board of Education* is not to be dismissed as futile—it must be assumed that the education of an entire elementary-school generation in a completely integrated environment has significantly altered the "choices" that might once have been made, making "freedom of choice" not an empty phrase but a reality. If that assumption (which can never be demonstrated until it is tested) is not valid now, there is little reason to hope that it will be valid after an additional four or six years of compulsion.

Unless compulsion is the permanent and only answer to the achievement of an integrated society, there must come a point at

8. The Government brief (p. 58) inaccurately states that "the court below" decided that rejection of the Alternative Plan was proper. Only Judge Ely addressed the question. Judge Chambers specifically stated that he did "not reach the merits of any other plan." Judge Wallace concluded that the district court's entire order was fatally defective because of the fundamental error referred to above. 519 F. 2d 430, 438, 440, 441 *et seq.*; Pet. for Cert. A12, A21, A23.

9. *Green* v. *County School Board of Kent County*, 391 U. S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U. S. 450 (1968).

which voluntarism is to be encouraged, not wholly forbidden. The problem of this case, which is the long-range problem of school systems throughout the country, cannot wisely be resolved merely by the citation of the *Green* and *Monroe* cases.

3. The Government, like the district court, invokes a false analogy in characterizing the board's proposals as a "freedom of choice plan", *simpliciter*, and in suggesting that the plan "is nothing more than a proposal to return to schools mirroring the racial image of the surrounding area." (Govt. Br. 63.)

That characterization disregards numerous relevant aspects of the proposed Alternative Plan: (a) The board proposed no changes in the provisions of the Pasadena Plan relating to junior and senior high schools. (App. 463.) (b) The plan did not propose the creation of attendance areas for particular schools and thus in no way fostered the re-emergence of the attendance pattern that had been found to be segregated prior to 1970. (App. 462.) There was no possibility of pupils simply returning to their "old" (i.e. pre-1970) schools. (c) Instead, the inertia of the system—i.e. the tendency of pupils to continue in the same schools—would be entirely on the side of the integrated pattern already in force for four years. (d) The attendance pattern would adjust itself within defined zones of balanced racial composition. (App. 462.) (e) The plan emphasized positive measures to encourage voluntary integration by creating significant educational distinctions among the schools within each zone (App. 460-62.) (f) The proposal for differentiated schools was based on actual and successful experience of the school board in promoting voluntary integration in specialized schools. (App. 462, 496, 525, 528, 356-73; see *infra*, pp. 15-17.) (g) The plan proposed back-up remedial measures in the event that any school's ethnic profile "should deviate significantly from the District-wide ethnic profile." (App. 462.)[10]

10. Whether the part-time pairing contemplated by the back-up measure was "an acceptable substitute for desegregation" must be

(Continued on next page)

In the light of these facts, it is apparent that the district court's rejection of the plan, to the extent that it did not rest solely on the judge's fixed purpose to enforce indefinitely a plan of compulsory racial balance in every school, resulted from improperly treating "freedom-of-choice" as a code word that automatically condemns any plan with elements of voluntariness. That approach should be rejected by this Court.

4. The district court gave little, if any, weight to the educational advantages of the school board's proposals (375 F. Supp. 1304, 1308; App. 457) and no weight to the board's judgment, based on its experience, that the proposals would succeed—indeed, he dismissed that judgment almost contemptuously. *(Ibid.)* While intimating that the quality of education is secondary in importance to the requirement of compulsory racial balance, he maintained that the educational opportunities of the existing plan were equal or superior to those of the board's plan, and that the board's objectives could be implemented under the existing plan.

Subsequent evidence discredits the court's opinions and confirms those of the board. We refer to the evidence and the result in the Audubon School controversy, wherein the district court has enjoined the board from instituting a "fundamental school" program in a predominantly black section of Pasadena. Order of October 8, 1975, stay granted by Mr. Justice Rehnquist, *Pasadena City Bd. of Ed.* v. *Spangler*, ... U. S. ....., 92 S. Ct. 416 (Dec. 22, 1975). Inexplicably, the Government's brief relies on testimony from that proceeding as supporting the district court's rejection of the Alternative Plan. (Govt. Br. 15.) What is actually shown by that testimony, and by the proceed-

judged, of course, in the light of the plan as a whole, not as if it stood by itself. See Govt. Br. 63, n. 48. Presumably the district court could have directed attention to its possible inadequacy had he deemed that question material. Any doubts the court entertained as to this detail of the plan could hardly have justified rejecting the entire plan out of hand. The district court made no reference to the pairing proposal in his opinion rejecting the Alternative Plan.

ing as a whole, is the solid merit of the board's proposals and the obstacles to their implementation created by the existing decree.

Prior to its petition for modification, the school board had experimented with several special or "magnet" schools with different educational approaches. "Alternative" schools featured an unstructured type of teaching; "fundamental" schools emphasized a rigorous approach to the teaching of basic skills. (Aud. Tr. 63-64.) Attendance at the schools was made voluntary and was open to all students in the district, subject to the requirement that the racial balance required under the decree be maintained. (Aud. Tr. 217-18.) These schools, therefore, represent a concrete demonstration that voluntary integration can be accomplished in connection with an innovative approach to education.[11] The fundamental schools have also shown highly promising results in educational achievement, especially for black students, as shown by the testimony of Dr. Myers that has been emphasized by the Government. (Govt. Br. 15-16, Aud. Tr. 17-18, 33.)

In 1975, a year after the district court's rejection of the Alternative Plan, the school board decided to institute a fundamental school at the Audubon school, in the predominantly black northwest section of Pasadena, both to encourage more black students to enter the program and to locate a school nearer their homes for some of the approximately 800 black students being bused to fundamental schools in predominantly white sections. (Aud. Tr. 234-36, 256, 45-46, 58-59.) Racial balance was to be maintained. On the eve of the opening of the new school year, the district court enjoined the conversion of Audu-

11. The president of the school board testified that a large private school with several hundred students had closed and that the students had said they would return to the Pasadena school system if a fundamental high school could be made available. Accordingly, an existing K-8 fundamental school was extended to include grades K through 12. Racial balance was maintained. (Aud. Tr. 27-28.) The school board has for some time had a waiting list of more than 1,000 white applicants for the fundamental schools, who have not been accommodated because of the required racial balance. (Aud. Tr. 17-18, 32-33, 43.)

bon to the fundamental program. It ordered reassignment of all pupils to their respective previous schools.

The court's action and reasoning are difficult to understand as an exercise of the remedial powers of equity to prevent segregation. No issue of racial balance or of unequal burdens on white and black students was involved. The court's objection was grounded on the fact that some 56 students, if they elected not to attend the fundamental program, might have had to be bused to a non-neighborhood school. (Aud. Tr. 222-23, 260.) Even that burden was of the court's own making: Another nearby school would have been available to them but for the court's undeviating adherence to the strict racial-balancing requirement. (Aud. Tr. 7-8, 52-54, 223-27.) Moreover, the added burden on those students was offset by the benefit to a much larger number of black students (some portion of the 800 already attending more distant fundamental schools) whose busing would be reduced or eliminated.

The court's conclusion, if comprehensible at all, appears to represent an educational judgment hostile to the fundamental-school concept. Its order is, in any event, a serious curtailment of the school board's discretion: The board is enjoined from establishing any additional fundamental schools "until studies and analyses are completed to demonstrate that such schools will not result in violation of the Pasadena Plan and are the least disruptive choices possible." Application for Stay, Docket No. A-538, Exhibit A, *Pasadena City Bd. of Ed.* v. *Spangler*, ... U. S. ....., 96 S. Ct. 416.

We submit that the Audubon episode convincingly supports, if further reasons were necessary, each of the propositions urged in this brief. It demonstrates the good-faith devotion of the school board to the objectives of its Alternative Plan, as well as the strong potential of that plan as a means of promoting voluntary integration and more successful education. It shows that the existing decree, as interpreted by the district court, is frustrating the board's attempted progress toward these objectives. Finally, the intrusive role assumed by the district court in attempting to

interpret and monitor its decree vividly illustrates why a school district that has become unitary in a constitutional sense should be released from judicial custody at the earliest reasonable time. Only by return of the day-to-day decision-making function to the school board can educational judgments, and the necessary balancing of competing aims and interests, be made by the authorities properly charged with that delicate function.

As in *Milliken* v. *Bradley*, this case does not present issues of substantive constitutional law. "The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." *Milliken* v. *Bradley*, 418 U. S. 717, 753 (Stewart, *J*. concurring.) This case presents that issue in a new dimension. In *Milliken* the question was the appropriate geographic reach of the remedy. Here it is the appropriate reach of the remedy over time. The underlying principle is the same: "The controlling principle consistently expounded . . . is that the scope of the remedy is determined by the nature and extent of the violation." *Id*. at 744. We submit that the disposition of this case by the courts below cannot be reconciled with that controlling principle.

This case is a novel one in yet another respect, intimately connected with the problem of duration of judicial control. The case requires the Court for the first time to consider the objectives of equity jurisdiction, not in dismantling a segregated school system, but in returning a "dismantled" system to a state of independence compatible with the constitution and with the goals of *Brown* v. *Board of Education*. We suggest that this phase of the problem, no less than the dismantling phase, calls for the exercise of equity's "traditional attributes" of "practical flexibility in shaping its remedies and . . . a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 300. If equity supervision is to continue at all, that flexibility, we urge, calls for recognition of

important values—such as educational quality, neighborhood schools, freedom of parents to determine their own best interests, and local control of the school system—to a greater degree than may be possible or appropriate where the aim of relief is to "end segregation, and end it now." Again, we submit, the differing nature of the problem at this stage of a desegregation remedy finds no recognition in the district court's refusal to permit modification of the decree.

The Government intimates that this is not an appropriate case for "a reexamination of busing as a remedy." (Govt. Br. 39.) We do not suggest that it is. The issue here is not the reexamination of the remedy imposed in the past to eliminate segregation; it is the examination of the appropriate remedy for the future of the Pasadena schools. Busing is merely one of many circumstances that condition the selection of a wise path. The Government also suggests that relief is foreclosed because petitioners "failed in their proof" as to the adverse consequences of continuing the existing Plan. But such a failure to persuade the district court cannot relieve a court of equity of the duty, in shaping a remedy, to recognize the obvious relevance of the board's underlying concerns, concerns which cannot be ignored in the wise pursuit of the goal set by *Brown* v. *Board of Education*. As Mr. Justice Powell has stated (concurring in *Keyes* v. *School District No. 1*, 413 U. S. 189, 250):

> No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races, or guess how much impetus such dismantlement gives the movement from inner city to suburb, and the further geographical separation of the races. Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools, or divert attention from the paramount goal of quality in education to a perennially divisive debate over who is to be transported where.

CONCLUSION.

For the foregoing reasons, the judgment of the lower courts should be reversed.

Respectfully submitted,

LEE G. PAUL,
PETER D. COLLISSON,
ROBERT G. LANE,
PAUL, HASTINGS, JANOFSKY & WALKER,
55 South Flower Street,
Los Angeles, California 90017,
Attorneys for Petitioners.

PHIL C. NEAL,
FRIEDMAN & KOVEN,
208 South LaSalle Street,
Chicago, Illinois 60604,
(312) 346-8500,
Of Counsel.